

THE DIAMOND CARTEL

Although the United States is the principal consumer of the world's diamond supply,¹ the diamond industry is so cartelized as to be virtually impervious to pressure by American users of diamonds. Within the past ten years industrial diamonds have become indispensable to various high-speed, precision manufacturing operations.² Since distribution of ninety-five percent of the world's diamond production is channelized through a single marketing combine, competitive forces within the industry have been short circuited.³ Therefore consumer resistance has been impracticable and American efforts to obtain a better bargaining position have so far been ineffective. The cartel is completely foreign-controlled and operates entirely outside the United States,⁴ thus obviating effective action under the antitrust laws and making

1. Leslie, *Diamonds as Tools Speed up Victory*, DOMESTIC COMMERCE, Aug. 1945, p. 28. Today, the United States uses approximately 90% of the world's production of industrial diamonds. § 29 Complaint, *DeBeers Consolidated Mines Ltd. v. United States*, 325 U.S. 212 (1945) [hereinafter referred to as Complaint]. This figure includes all categories of industrial diamonds—ballas, boart and carbonado. For a description of the types of industrial diamonds, see *Diamonds for Victory*, FOREIGN COMMERCE, Jan. 17, 1942, p. 4; *Industrial Diamonds*, FORTUNE, June 1935, p. 22. Carbonado is rare and almost entirely confined to Brazil and will not enter into the discussion hereafter. Post-war production should produce the following ratios of diamond types: out of every 10,000 carats 250 will be carbonado, 1,900 ballas, 1,975 gemstones, and 5,875 boart. Until 1940, diamond imports were chiefly gemstones for luxury purposes.

2. Leslie, *supra* note 1, at 28. For a general list of industrial uses for diamonds, see § 21 Complaint; Grodzinski, *Manifold Uses of Industrial Diamonds*, 15 CROWN COLONIST 383, 385 (1945); U. S. Exec. Agreement Ser. 317 (Dept. State 1943) *Industrial Diamonds*, (March 26, 1943) app. IV, §§ 1-5. [hereinafter referred to as Industrial Diamond Treaty].

3. Sir Ernest Oppenheimer, speaking as the Chairman of the Board of Directors of DeBeers, said of the subsidiary corporation of the diamond cartel which acts as the sales agency, "The Diamond Trading Company . . . handles approximately 95 per cent of the total world production, and it will be appreciated that, although the ideal of 100 per cent has not yet been achieved, we are nearer to it now than at any time in the past, and what I may call the uncontrolled diamond production is really a negligible part of the trade." CHILVERS, *THE STORY OF DEBEERS* v. (1939). See LEITH, *WORLD MINERALS AND WORLD PEACE* 126, 130 (1943); HEXNER, *INTERNATIONAL CARTELS* 252 (1946).

4. More than 90% of the world's known diamond deposits are to be found in the continent of Africa. See LEITH, *op. cit. supra* note 3, at 96. The remainder are primarily found in South America. See *id.* at 26. At least two possible sources of diamonds exist in the United States (in Arkansas and Kentucky), see *infra* n. 51, but both deposits are insignificant and have been unprofitable to mine.

The sales center from which African diamonds are distributed today is London. *Business Abroad*, FORTUNE, April 1945, p. 250; cf. *infra* n. 17. At previous times Antwerp, Capetown and Berlin have also acted as selling markets for diamonds.

The countries primarily concerned, all of which are favorably inclined toward monopolistic practices, are the Union of South Africa, British Gold Coast Colony, Belgian Congo, Portuguese Angola, French West Africa and French Equatorial Africa. Since all of these countries were aligned with the United Nations in World War II and will probably remain within the sphere of Anglo-American influence, there is no great military urgency

other forms of governmental action difficult. Consequently, protection of the American diamond user presents a uniquely complex problem in the application of correctives for the concentration of economic power.

This discussion will attempt to analyze the structure of the diamond industry as a basis for the evaluation of three methods for curbing the power of the diamond cartel and enhancing the bargaining power of American consumers. Legal suit by the United States government would mean the prosecution of the members of the diamond cartel under the anti-trust laws. Such a suit was instituted in January 1945 and is presently being argued in the federal courts.⁵ Unilateral economic action by the American government, upon the principle of opposing the cartel's monopoly with a government monopoly, presents a second possible method of attack. The final possibility, diplomatic agreement, will be attempted at the International Trade Conference in Havana.

STRUCTURE OF THE INDUSTRY

Since ninety-six percent of the world's diamond supply is mined in Africa, African diamond production is practically synonymous with the diamond industry.⁶ Today the product of Africa's diamond industry has two main purposes. Until recently diamonds were in demand almost exclusively for their value as gems,⁷ but during World War II an extensive industrial use for diamonds in high-speed precision manufacturing developed, until today about six times as many carats of diamonds are sold annually for industrial purposes as are sold for gemstones. The pipe mines of South Africa are rich in gemstones, as high as thirty-five percent of their yield being suitable for gem purposes. While industrial diamonds are thus largely a by-product of South African diamond production, the alluvial deposits in Western and Central Africa—the other main source of African diamonds—yield stones that are mainly suitable only for industrial purposes.

To control this sole important source of the world's diamond supply the

to break the diamond cartel. But from the economic viewpoint this factor may tend to thwart direct American action against the cartel because it is domiciled in friendly territory, primarily the British Empire.

5. *United States v. DeBeers Consolidated Mines, Ltd.*, Civil Action 29-446 (S.D.N.Y. 1945). For comments on this suit see *Business Abroad*, *FORTUNE*, Apr. 1945, p. 250.

6. See § 28 Complaint. The discovery of diamonds in the bed of the Vaal River in South Africa in 1867 led to the "Diamond Rush" of 1870. Prior to this time the world's supply of diamonds consisted of about 20,000,000 carats, unearthed chiefly in India and Brazil. Since 1870 Africa has contributed approximately 275,000,000 carats of diamonds while the rest of the world has produced around 12,000,000 carats. Hereafter references to "the diamond industry" will deal exclusively with the African production and its marketing unless otherwise indicated.

7. *Diamonds*, *FORTUNE*, May 1935, p. 73; *Industrial Diamonds*, *FORTUNE*, June 1935, p. 22. See *supra* n. 1.

major African diamond producers have successfully organized one of the world's most powerful international cartels by a combination of two policies—direct ownership of mines, and a single marketing agency for all rough diamond sales.⁸ The chief members of this cartel are the African diamond producing syndicate known as the "Big Four"—British DeBeers, Belgian Forminiere, Portuguese Diamang, and Anglo-French CAST⁹—of which DeBeers is clearly dominant.

The creation of a monopoly in South Africa under the DeBeers Consolidated Mines, Ltd. followed a pattern familiar to the architects of many an American industrial empire. Commencing its omnivorous corporate growth in 1881 by uniting individual claims at one of the world's richest pipe¹⁰ mines into the first pipe mine to be operated as a single unit, DeBeers gradually swallowed up through stock purchase and financial manipulation one competitor after another¹¹ until today¹² it directly owns or controls, with a few

8. "In the purely diamond sphere Rhodes laid it down as the policy of DeBeers to acquire the control by amalgamation or purchase of all important producers of diamonds in South Africa, and to arrange, in so far as possible, for the entire diamond productions of the world to be marketed through one channel. These remain the fundamental principles upon which the Diamond Trade is based." Sir Ernest Oppenheimer in a Foreword to CHILVERS, *THE STORY OF DEBEERS* v. (1939).

9. DeBeers Consolidated Mines, Ltd., referred to hereafter as DeBeers; Soci t  Internationale Forestiere et Mini re du Congo, commonly known as Forminiere; Companhia de Diamantes de Angola, referred to as Diamang; and Consolidated African Selection Trust, Ltd., to be referred to as CAST. Forminiere, established in 1906, controls four subsidiary holding companies, Beceka and the triumvirate known as EKL or Enrte Kasai Luebo—Kasai, Lueta and Luebo,—which in return for a half interest granted to the Belgian government, obtained the exclusive concessions to mine diamonds in the Belgian Congo. Diamang, incorporated in 1917, owns the concession to mine all alluvial deposits in Portuguese Angola. Forminiere has a 25% interest in Diamang and their diamond fields are contiguous. The two concerns usually follow the same policy. CAST controls more than 75% of the production of the Gold Coast, controls the production of Sierra Leone through a subsidiary, and has extensive ownership in the French West African Soguinex mining company and the Ouganghi properties of French Equatorial Africa.

10. "Pipe" mines are to be distinguished from "alluvial" deposits or mines. In a "pipe," the diamonds are found in their original matrix, "magma," and are concentrated in a cylindrical area extending down towards the earth's center. The only "pipes" known to exist today are located in the Kimberley area of South Africa. "Alluvial" deposits of diamonds are more common and usually occur along present or past watercourses. Geologists believe the diamonds have been carried to such locations after erosion freed them from their original matrix.

11. In 1891, the newly discovered Wesselton pipe mine was purchased outright. By 1900 DeBeers had acquired 100% ownership of Bultfontein and Dutoitspan. In 1911 the Koffyfontein pipe mine was purchased. Between 1912 and 1922 a controlling interest in the Premier pipe mine was obtained. All of these fell within the category of competing mines "too rich to ignore." Other competitive mines that were purchased, but considered "too poor to work" and consequently shut down, were Peiser in 1910, Voorspoed in 1912, Kamfersdam in 1926, and the Lichtenburg properties in 1927.

12. In 1931 DeBeers obtained the controlling interest in Jagersfontein. The same year

minor exceptions,¹³ all diamond fields in South Africa. If its South African gemstone and industrial production are considered together, DeBeers' diamond production is slightly more than fifty percent, by value, of all the African production.

While DeBeers was engaged in extending its sway over all South African diamond production, new discoveries of diamonds in Western and Central Africa—not under the British flag—brought into the trade competing producers over whom DeBeers found it difficult to obtain direct control.¹⁴ To eliminate this competitive element, the directorate of DeBeers initiated a plan for the marketing of all diamonds through a single sales channel.¹⁵ The diamond industry's marketing system, and DeBeers' dominant position in it, became fully established in the early 1930's with the creation of three new corporate entities—the Diamond Trading Corporation, Ltd., the Diamond Producers Association, Ltd., and the Diamond Trading Company, Ltd.—all controlled by DeBeers. The Diamond Corporation holds exclusive contracts for the purchase of the alluvial diamond production of Western and Central Africa. The Diamond Producers Association functions as the sole purchaser of South African diamonds. Both the Diamond Corporation and Diamond Producers Association sell their diamonds exclusively to the Diamond Trading Company, which is thus the single distributing agency for ninety-seven percent of the African diamond production.¹⁶

it purchased a 30% interest in Consolidated Diamond Mines of South West Africa, Ltd. (hereinafter referred to as Consolidated) and a 44% interest in Cape Coast Exploration Co., Ltd. The 1938 purchase of 25% more of Cape Coast's stock from the Chester Beatty syndicate completed control of this potential competitor. In 1942 another 11% of Consolidated was acquired which, with the 12% that DeBeers' director, Sir Ernest Oppenheimer, controls as president of Anglo-American Investment Trust, Ltd., gave the requisite majority stock control.

13. The State Diggings of Namaqualand (South West Africa) producing about 50,000 carats of diamonds annually, and other alluvial deposits producing about 100,000 carats a year, are outside the DeBeers orbit.

14. In 1908 a German corporation (Regie) was organized to operate alluvial deposits in German South West Africa. Diamond fields were discovered in the Belgian Congo about 1906, but large-scale production did not commence until 1913. These were the only important foreign competitors prior to World War I.

15. This marketing plan is sometimes attributed to Rhodes [see Sir Ernest Oppenheimer in Foreword to CHILVERS, *THE STORY OF DEBEERS v. (1939)*]. But it is more likely the creation of Solly Joel, who was Chairman of the Board of Directors in 1914, since Joel had extensive experience in the London diamond market before he acquired control of DeBeers through inheritance of stock from his uncle, Barney "Barnato" Isaacs.

For a detailed study of the growth of the single sales channel, see *Diamonds*, *FORTUNE* May 1935, pp. 124-39.

16. Stock ownership in Diamond Trading Co. is 38% DeBeers; 53% Anglo-American Investment Trust and Barnato Bros. (both brokerage firms dominated by Oppenheimer and DeBeers directors); and 9% Consolidated (subsidiary of DeBeers) and Diamond Corporation. Diamond Corporation is owned 80% by DeBeers and 20% by Consolidated. Cf. LETH, *op. cit. supra* note 3, at 127 n. 44. Both of these marketing corporations are merely holding companies or central offices for the cartel. They are not in-

The distribution of diamonds from the Diamond Trading Company to the ultimate consumer is highly complicated by a chain of brokers, cutters, wholesalers, and retailers. Diamonds, still in rough hewn shape, are shipped to London and there sold by the Diamond Trading Company¹⁷ to a very small number of select diamond brokers. The brokers sell to cutters who polish and cut the stones into the finished product,¹⁸ and the finished diamonds then pass through the hands of wholesalers and retailers before reaching their final destination—the consumer. Because of the great number of transactions involved and because the cutters in particular, and the brokers to a lesser degree, do not seriously compete, the price of finished diamond products is about ten times what was paid to the Diamond Trading Company for them.¹⁹

These intermediaries are not known to be directly responsible to the producers' cartel. But since the cartel controls ninety-five percent of total rough diamond production, it is able to control indirectly the terms of sale of the finished diamonds as well. Thus any attempt to provide greater bargaining power or to obtain lower prices for American consumers requires an attack upon the restrictive business practices of the cartel of diamond producers, even though most industrial users never deal directly with the producers.

TECHNIQUES OF OPERATION

The diamond cartel has developed rigid methods of operation which insure stability within the industry, but which often work hardship upon the consumer.²⁰ The three keystones in the operating policy of the cartel are: (1) maintenance of fixed minimum prices for diamonds, (2) limitation of production to that quantity which can be sold at the desired price, and (3) assurance of a market for the entire run-of-the-mine production of diamonds.

Minimum price maintenance and production limitation are achieved through a series of contracts between the producers and the regional intermediary cor-

tended to make a profit and their net receipts are distributed proportionately to the producers. They are, however, the reins of control. DeBeers' predominant position as a producer coupled with its complete ownership of these marketing agencies have resulted in complete dictation of the cartel's policy by DeBeers. Diamond Producers Association is essentially the incorporation of the former South African Conference Producers, now that DeBeers has obtained direct ownership of all these companies. The story of DeBeers control in this corporation is detailed in *The Diamond Cartel*, 110 NEW REPUBLIC 437 (1944).

17. HEXNER, *INTERNATIONAL CARTELS* 252 (1945). Certain producers in Namaqualand (South West Africa), Gold Coast Colony, Tanganyika and French Equatorial Africa do not market through the cartel's sales agency. Of these the only sizable producers are in the Gold Coast where at least four small syndicates operate independently—West African Diamond Syndicate (WADS), Holland Syndicate, Cayco, Ltd. and Morkwa, Ltd. The total annual output of all these independent producers is about 350,000 carats.

18. LEITH, *op. cit. supra* note 3, at 128. See also HEXNER, *INTERNATIONAL CARTELS* 253 (1946); *Diamond Cutters*, FORTUNE, June 1935, p. 104.

19. *Diamonds*, FORTUNE, May 1935, p. 73.

20. See TIME, Feb. 12, 1945, p. 82; LEITH, *op. cit. supra* note 3, at 128; *Diamonds*, FORTUNE, May 1935, p. 128, 130, 139.

porations (Diamond Corporation and Diamond Producers Association), and these latter two corporations and the Diamond Trading Company, the industry's sole distributor. Each contract contains a valuation or price-fixing clause²¹ which is founded on a "basis value" for diamonds of varying size and quality determined by DeBeers and which puts an effective floor under the prices paid to the producers. Just as all these contracts contain price-fixing clauses, so they contain clauses establishing a quota system by which production is limited.²² Since the quota allocated to each producer is an established percentage of the total amount of diamonds absorbed by the market during the last six months sales period,²³ the cartel can effectively limit production within the industry to a quantity no greater than the diamonds which have been marketed previously at the desired price.

When, in a period of contracting markets, the quota system proves inadequate to maintain diamond prices, resort may be had to other methods of price stabilization. Thus production is voluntarily reduced below the quota figure, diamonds are withheld from the market, and "outside diamonds" from "uncontrolled producers" are bought up to keep them off the market.²⁴ DeBeers voluntarily closed down nearly all its pipe mines between 1930 and 1934²⁵ in order to restrict production, and the value of stockpiles of diamonds withheld from the market by Diamond Trading Company has been as high as \$60,000,000.

The cartel insures a market for its *entire* output through sales methods analogous to "full-line forcing" and "block-booking" employed at one time or another in certain American industries. The list of prospective purchasers who may buy at the Diamond Trading Company's "sights" is limited to "ap-

21. This "valuation clause" sets a scale of monetary value for various grades of diamonds and is entirely determined by their value as gemstones. The scale is based upon the average sale price in the years between 1890 and 1900.

22. The quota system ostensibly applies only to gem diamonds, but, since mining for industrials alone would not be possible, the quota system thus regulates the supply of industrial diamonds as well. See *The Diamond Cartel*, 110 NEW REPUBLIC 437 (1944); § 43 Complaint.

23. This is the so-called "replacement" clause which obligates the Diamond Trading Co. to purchase from each producer, via the intermediate purchasing agency, no more than a quantity of diamonds equal in value to that producer's allotted percentage of the total market sales occurring in the previous six months' period, less 10% which allows for the average mark-up value between prices paid to the producer and market sales prices.

24. In an effort to prevent a break in the market when the Lichtenburg diamond fields threw 2,000,000 carats on the market in 1927, the Diamond Syndicate purchased heavily in the open market creating a stockpile of diamonds valued at £12,000,000 by 1931. It was the necessity for liquidating these excessive stocks which led DeBeers to all but cease production during the thirties.

25. Although the DeBeers' pipe mines were allotted a quota of about 75% of the African diamond production (somewhat over a million carats a year), they were voluntarily shut down for a majority of the time from 1930 to 1943. In the eleven years from July 1932 to July 1943 South Africa produced only about 3,500,000 carats of diamonds.

proved brokers,"²⁶ allegedly those who have purchased at least £20,000 worth of diamonds at the previous "sight".²⁷ Those who are permitted to participate in the sale must purchase diamonds only by "series". Since a "series" represents a cross-section or slice of the diamond supplies as they come from the mines,²⁸ with all types and qualities of diamonds for use as gems represented, purchasers can not exercise the normal power of selection which exists in a competitive market. The cartel justifies this type of selling on the grounds that producers can not profitably carry out mining operations for a particular type of diamond and must be assured of a market for the entire run-of-the-mine production.

Substantially the same method is employed in marketing industrial diamonds as the cartel follows in marketing gemstones.²⁹ The Diamond Trading Company offers industrial "series" to selected London brokers in the same manner as the gem "series", again insuring that the entire production is sold.

The cartel's method of marketing industrial diamonds³⁰ is the source of bitter complaints, both by industrial consumers and by such producers as Forminiere and Diamang, whose production is over 80% "industrials." The standards of gem trading are not applicable to industrial diamonds and gem classifications here are impractical and meaningless. Industrial diamonds have become a commodity ready for the application of price factors based upon their industrial value—the value which they can contribute to a finished product. Separate marketing methods for industrials seem an inevitable de-

26. There are about fifteen London diamond brokerage houses to whom the cartel is willing to sell. Diamond Trading Co. refuses to deal with any other individuals. The approved list, as of 1935, can be found in *Diamonds*, FORTUNE, May 1935, p. 139. See also TIME, Feb. 12, 1945, p. 82.

27. §§ 52-4 Complaint.

28. From an average 350 tons of ore, 46 carats of diamond will be extracted. The 46 carats will consist of the following percentages: 5% major gemstones, 15% small gemstones, 20% ballas, 60% boart. But figures from mine to mine vary widely. In the Belgian Congo, for example, the production consists of about 90% boart. At the other extreme, the Jagersfontein pipe mine produces about 25% major gemstones. Similarly, the incidence of diamonds varies greatly. Kimberley, which is representative of the pipe mine in general, has one part diamond in fourteen million parts of ore. The Belgian Congo has the unusually high incidence of one to twelve and a half million, whereas alluvial deposits in general run one part in every forty million.

29. Almost invariably the different syndicates which marketed industrial diamonds were headed by Otto Oppenheimer, the brother of the Chairman of DeBeers. On at least two occasions prior to 1940 the cartel attempted unsuccessfully to establish its own separate marketing channel for industrial diamonds. *Industrial Diamonds*, FORTUNE, June 1935, p. 22. "Common goods" were essentially a by-product or drug on the market until technological changes in the machine-tool industry, coupled with extensive wartime needs for high-speed precision tools, provided an expanding market for industrial diamonds. *Compare Industrial Diamonds*, FORTUNE, June 1935, p. 22 with Leslie, *Diamonds as Tools Speed Up Victory*, DOMESTIC COMMERCE, Aug. 1945, p. 28.

30. The diamond cartel has been operated on the traditional basis of a luxury trade in gemstones. Although industrial diamonds comprise about 85% of the volume of yearly diamond production, they only amount to about 28% of its value. See § 24 Complaint.

velopment for the near future if the cartel is to continue operations. A New York diamond expert suggested, in an interview, that the cartel intends to establish a separate marketing agency for industrial diamonds to be known as Industrial Distributors, Ltd.³¹ Failure to reorganize so that industrial diamonds are given proper recognition would jeopardize the cartel's solidarity.

Thus the diamond cartel holds a monopoly in an industry which produces a substance essential to many American industrial processes today. It is a monopoly of long-standing, with the rigidity of a system now half a century old—a solidly knit structure of ownership, control, contractual relationship, and trade practice. Such a system of control has been able to impose the burden of high, fixed prices upon the American industrial diamond consumers because they have been without any bargaining power to force a change in the arbitrary methods of marketing.

METHODS FOR ATTACKING CARTEL POWER

Judicial Decree:

Civil and criminal suits under the Sherman Anti-Trust Act and the Wilson Tariff Act³² provide one method of curbing restrictive trade practices of foreign industries selling to American consumers. Two such suits are now pending decision in the District Court for the Southern District of New York: *United States v. DeBeers Consolidated Mines Company, Ltd.* and *United States v. Société Internationale Forestière et Minière du Congo*.³³ The government, alleging violations of Sections 1 and 2 of the Sherman Act and of Section 73 of the Wilson Tariff Act, seeks a judgment which would (1) perpetually enjoin monopolistic practices in the diamond industry, (2) require diamond sales directly from producers to consumers, and (3) prohibit conspiracies which attempt to fix diamond prices and limit United States imports.

However, to be effective, a judicial attack on foreign cartels must surmount the twin difficulties of obtaining jurisdiction over the foreign corporations and of retaining within the court's reach tangible assets sufficient to enforce a decree.³⁴ To obtain jurisdiction over Forminiere, process was served on five men who were alleged to be members of a voting trust called the Congo Mines Participation Agreement, which, together with the Société Générale de Belgique, controls the policies of Forminiere. The British combine operating in

31. Interview on March 27, 1946 with Dorus van Itallie, former technical advisor to the War Production Board.

32. 26 STAT. 209 (1890), 15 U. S. C. § 1 (1940) [Sherman Anti-Trust Act] and 23 STAT. 570 (1894), 15 U. S. C. § 8 (1940) [Wilson Tariff Act].

33. Civil Action 29-446 (S. D. N. Y.). An interlocutory appeal was taken to the Supreme Court, *DeBeers Consolidated Mines, Ltd., v. United States*, 325 U. S. 212 (1945).

34. Hamilton, *The Control of Strategic Materials*, 34 AM. ECON. REV. 261, 269 (1944).

Sierra Leone and Gold Coast was served through the alleged managing director of both Consolidated Africa Selection Trust and Sierra Leone Selection Trust.³⁵

Even if service of process on these defendants is held to be valid, jurisdiction over the dominant and most elusive of the corporations, DeBeers and its subsidiaries, Diamond Corporation and Diamond Trading Company, must still be obtained or any decree that is rendered will be practically useless. The court served process on a diamond expert, and the New York geology firm of which he is a member, alleged to be in the employ of DeBeers; the New York agency of the Banque Diamantaire Anversoise, claimed to be an agent of the Diamond Trading Company; and a New York firm which handles a DeBeers' advertising program in the United States. The diamond expert, by affidavit, asserts that he is under contract to DeBeers as an independent expert and not as an agent. The advertising company also claims that it is an independent contractor. The bank declares, under oath, that less than fifteen percent of its shares are held by DeBeers or its associates. Consequently, as far as the dominant DeBeers and its subsidiaries are concerned, it is doubtful whether valid jurisdiction has been obtained.

While awaiting decision on the question of whether the court has jurisdiction and on the further jurisdictional question of whether the defendants are doing business within the United States, the Department of Justice took steps to insure that the defendants would have some interest in obeying any decree that might be granted by obtaining a temporary restraining order to keep assets of the companies within the United States.³⁶ Bank accounts totaling \$738,320 and machinery and supplies purchased by Forminiere and Diamang valued at approximately \$100,000 were covered by the injunction.³⁷ No diamonds, however, were sequestered by the order. The cartel's selling technique by which the sale and transfer of ownership is complete as soon as the diamonds leave the London offices of the Diamond Trading Company³⁸ has been most effective in keeping the entire marketing transaction within Great Britain and without the jurisdiction of the United States.³⁹

The Supreme Court, upon review,⁴⁰ reversed the decree because it found the order "... deals with a matter lying wholly outside the issues in the

35. Summons and §§ 1-20 Complaint.

36. Record 36 (temporary restraining order issued Jan. 29, 1945). The government thereafter moved for a temporary injunction to replace the temporary restraining order pending the determination of the issues in the suits. This motion was heard and granted by Judge Mandelbaum on March 28, 1945. Record 168. The preliminary injunctions issued April 3, 1945. From this order the defendants appealed directly to the Supreme Court.

37. DeBeers Consolidated Mines, Ltd., v. United States, 325 U.S. 212, 216 (1945).

38. § 53 Complaint.

39. In connection with the difficulty of obtaining jurisdiction, due to the diamond cartel's almost exclusively extra-U.S. operations, see *supra* note 4.

40. Although a preliminary injunction is an interlocutory order and not generally appealable in anti-trust suits wherein the United States is the complainant [36 STAT. 1167

suit. It deals with property which in no circumstances can be dealt with in any final injunction that may be entered."⁴¹ In the absence of control over substantial assets of the diamond cartel, it is difficult to see how any decree can be enforced.

Even if the procedural hurdles of jurisdiction and enforcement are surmounted, there are serious substantive impediments to anti-trust suits against foreign cartels. Early decisions held that jurisdiction depended upon a violation which had occurred within the United States or which had been illegal in the country where committed.⁴² Even with possible relaxation of these requirements,⁴³ it seems unlikely that legal enforcement of an injunction would seriously affect the diamond cartel.⁴⁴ Prosecution of suits might mean little more than that the companies would be more careful to remain beyond the jurisdiction of the federal courts, would cancel outstanding advertising contracts in this country, and would cease purchases of equipment in the United States.⁴⁵ However, though anti-trust suits against the diamond cartel would appear unsatisfactory as a primary means of attack, legal action as a means

(1911), 15 U.S.C. § 29 (1940)], the Supreme Court took jurisdiction under § 262 of the Judicial Code [36 STAT. 1162 (1911), 28 U.S.C. § 377 (1940) (power to issue writs necessary to obtain jurisdiction not otherwise provided for)]. The Court justified such extraordinary action on the grounds that it could review an interlocutory order where a lower court had no judicial power to issue it. ". . . when its action is not mere error but usurpation of power—the situation falls precisely within the allowable use of § 262." *DeBeers Consolidated Mines, Ltd., v. United States*, 325 U.S. 212, 217 (1945).

41. *Id.* at 220. *Cf.* 31 VA. L. REV. 946 (1945); 44 MICH. L. REV. 169 (1945).

42. *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *United States v. Sisal Sales Corp.*, 274 U. S. 268 (1927).

43. Compare Lockwood & Schmeisser, *Restrictive Business Practice in International Trade*, 11 LAW & CONTEMP. PROB. 663, 673 (1946) with Oseas, *Antitrust Prosecutions of International Business*, 30 CORN. L. Q. 42, 44-5 (1944).

44. *United States v. 383,340 Ounces of Quinine Derivatives*, Admiralty Suit 98-242 (S. D. N. Y. 1928) (quinine seized under forfeiture proceeding led to consent decree); *United States v. Deutsches Kalisyndikat Gesellschaft*, 31 F.2d (S. D. N. Y. 1929) (anti-trust suit to enjoin potash cartel sales in United States); *United States v. 5898 Cases of Sardines*, Admiralty Suit 105-37 (S.D.N.Y. 1930) (sardines seized under forfeiture proceedings led to consent decree). Of the consent decree in the quinine case, the product most resembling diamonds in these three suits, it was commented: "It is obvious that while such a decree may place some obstacles in the way of the smooth operation of the monopoly, the monopoly will not be destroyed. The most that can be said is that it cannot function quite as efficiently as before. . . . With the greatest optimism we can say that once the product reaches our shores it is no longer subject to illegal controls. But the control at the source remains. . . . Nothing in our antitrust laws can prevent a foreign monopolist from saying: 'Here I sit in Amsterdam with the world's supply of quinine. If you want any, you may come here and buy it on my terms.'" Oseas, *Antitrust Prosecutions of International Business*, 30 CORN. L. Q. 42, 55 (1944). See also EDWARDS, A CARTEL POLICY FOR THE UNITED NATIONS 95 (1945).

45. This was the view taken by Robert T. Swaine, counsel for DeBeers in the present suit, when interviewed on June 21, 1946. Dorus van Itallie, a New York diamond expert, when interviewed on March 27, 1946, told of tentative plans of the diamond cartel to open offices in New York City because of the large volume of trade. But the "ungentlemanly

of harassing the cartel, combined with other governmental efforts to acquire better bargaining terms for American consumers may serve a valuable purpose.⁴⁶

Economic Persuasion:

If it be conceded that legal action by itself does not provide an adequate method of attack upon the cartel, what economic factors can be utilized to improve the bargaining position of the American industrial diamond consumers? While a determined technology has been able to produce substitutes for many materials in which the United States is deficient, it is improbable that any complete equivalent can be found for the extremely hard and abrasive diamond.⁴⁷ Within the limited area in which a substitute could be utilized, tungsten carbide most closely approaches the desirable characteristics of the diamond.⁴⁸ The stimulus for technological development, however, would have to emanate from governmental subsidies or tariff protection. Past experience with protected industries producing synthetic materials suggests that the development of the tungsten carbide industry would not lower prices for industrial abrasives.

Nor does it appear that the considerable need for natural stones which would exist in any case can be met from sources not presently under the control of the DeBeers cartel. Brazil,⁴⁹ British Guiana, and Venezuela have been producing small quantities of diamonds. Certain of the alluvial fields in South Africa, in Liberia, in Gold Coast, in French Equatorial Africa, and in

conduct" of the Department of Justice caused the cancellation of these plans. See also HEXNER, *INTERNATIONAL CARTELS* 253 (1946) which discusses the opening of a branch office of Diamond Trading Co. in Hamilton, Bermuda after suit was filed.

46. Hamilton, *The Control of Strategic Materials*, 34 AM. ECON. REV. 261, 269 (1944).

47. Diamond stands as ten, or the hardest mineral, in Moh's law of hardnesses. By relative scales diamond is four times as hard as the next hardest mineral, corundum. See *Diamonds*, FORTUNE, May 1935, p. 67.

48. The chemical formulae for tungsten carbide products vary with the manufacturer. "Kennametal," which is one of the best-known tool-metal tungsten carbides on the market, is $WTiC_2$. This is a compound of tungsten carbide and titanium carbide and is produced by McKenna Metals Co. LI AND WANG, *TUNGSTEN*, 217 (1939). "Carboloy" is the trade name for a General Electric tungsten carbide product. *Id.* at 384. Discovered in Europe about 1926, the compound was introduced in the United States about 1930. Its chief present use is to replace steel as a high-speed cutting tool because of its hardness, abrasiveness, and resistance to heat.

49. Diamonds were first discovered in Brazil in 1721 at Tejuco (now Diamantina). At first nearly 100,000 carats a year were mined, but after the surface deposits were worked production declined. The mines began to flourish again about 1850 reaching a peak production of about 700,000 carats a year. But the discovery of diamonds in South Africa caused the Brazilian mines to be shut down about 1875. Mining operations were resumed about 1930 and Brazil now markets about 350,000 carats annually. See 41 SCIENCE NEWS LETTER 261 (1945); *Diamonds for Victory*, FOREIGN COMMERCE, Jan. 17, 1942, p. 4. Carbonado or black diamond is found almost exclusively in Brazil. See *supra* n. 1.

Tanganyika produce and market industrial diamonds outside the cartel.⁵⁰ There are even tiny deposits of diamonds in the United States—in Arkansas and Kentucky.⁵¹ While the government might develop these independent sources, all of them together at present could produce less than one million carats of diamonds a year, or about twelve percent of the average consumption of the United States.

Thus, before the American government enacts tariff regulations which discriminate against producers marketing through cartel channels, it must anticipate by further action the severing of supply. Such anticipatory action would include the accumulation of a stockpile to meet immediate demands of American consumers as the present domestic supply would be sufficient for little more than a year. During the past war the government created agencies to stockpile critical materials, but the cartel continuously obstructed American efforts to create any sizeable stocks of diamonds. The durability of DeBeers in weathering the severe economic strain of the diamond depression from 1927 to 1935 seems to preclude hope that it could be brought to terms within the one or two years before existing American stocks are depleted.

Economic pressure would appear most effective in the attempt to separate the industrial diamond producers from the predominantly gemstone interests of DeBeers. The increased demand for industrial diamonds, which has recently made them an important commodity in their own right, has seriously altered the balance of power within the industry. Forminiere alone supplies two-thirds of the world's industrial diamonds today. Forminiere, Diamang, and CAST together can probably produce ten million carats of diamonds annually of which only about ten percent will be gemstones. Post-war estimates for South African mine production indicate two and one half million carats a year of which only a million and one half carats would be industrial diamonds. Moreover, as the pipe mines get deeper, DeBeers' costs are rising; the costs of alluvial mining, on the other hand, are practically stable.

The establishment of a government agency endowed with sole purchasing authority for the American market⁵² might exploit the increasing independence of the Central and West African alluvial producers and pry loose dis-

50. See *supra*, n. 17, 21.

51. See *U.S. Diamonds*, FORTUNE, May 1935, p. 38; NEWSWEEK, Aug. 30, 1943, p. 62. The Arkansas deposits—in Elliot County—have been worked intermittently but without much success. The yield seems to be too small to make it profitable. A Bureau of Mines survey in 1944 stated that the mines were not feasible for successful operation without large subsidies. See letter to YALE L.J. from Drew F. Holbrook, Ass't Geologist, Arkansas Resources and Development Commission, dated March 22, 1946. The deposit of diamond-bearing-soil in Pike County, Kentucky is little known and its possibilities have never been exploited.

52. See Levi, Dept. Justice Memo. No. 3 (Dec. 7, 1942) submitted to Dept. State Comm. on Private Monopolies and Cartels (unpublished). This memorandum sets out a five-point, limited program as a partial solution of outstanding difficulties in the international cartel field. The second point is the creation of a governmental marketing and purchasing agency. The relative advantages and disadvantages of such a plan of collective

satisfied elements within the cartel.⁵³ Evidence that the United States market, which already consumes about ninety percent of all industrial diamonds, could be expanded if prices are lowered might be an added attraction to persuade Forminiere, Diamang, and CAST to sell directly to such an American agency. Since each major producer has something close to a monopoly in certain categories of diamonds, such a program would not create free competition within the industry.⁵⁴ But there would be a great saving to American consumers merely from the elimination of middlemen's profits. Even for this method of attack, however, a domestic stockpile would be a desirable asset, if not a prerequisite, for the government purchasing agency.

The disadvantages to be weighed against such a plan must include the regimentation by the purchasing agency of American buyers.⁵⁵ In addition, such a scheme is difficult to reconcile with recently avowed determination to establish international free trade.⁵⁶ Even more important is the opposition of Great Britain, the Union of South Africa, Belgium (and to a lesser extent the colonial governments of France and Portugal) to a program which lessens the profitability of their stakes in the diamond industry.⁵⁷ These states possess strong economic sanctions in the power to grant mineral rights, corporate charters, and to tax profits and exports.⁵⁸ The cooperation of these coun-

bargaining on the part of the buyers are detailed in Hamilton, *The Control of Strategic Materials*, 34 AM. ECON. REV. 261, 265 (1944).

53. See text *supra*.

54. This drawback was suggested in an interview with Dorus van Itallie on March 27, 1946. See also Haselity, *International Cartel Policy*, 55 J. POL. ECON. 1, 6-7 (1947). "The market situation leading to international cartelization is thus, in the majority of cases, one of oligopoly." "... if such cartels are dissolved, the resulting situation may be a renewal of oligopoly. . . . Dissolution of international cartels would have to be accompanied by the establishment of effective competition [if production is to be increased and prices lowered], an end almost impossible to achieve in practice."

55. See generally MASON, *CONTROLLING WORLD TRADE* (1946); BERGE, *CARTELS, CHALLENGE TO A FREE WORLD* (1944).

56. Comm. Policy Ser. No. 79, *Proposals for Expansion of World Trade and Employment*, Dep't State Pub. 2411. (Nov. 1945).

57. The government of the Belgian Congo receives fifty percent of the profits made by Forminiere. The colonial government of Portuguese Angola is satisfied with forty percent of Diamang's profits. The Union of South Africa obtains one of the largest portions of its revenue from the fifteen percent net profits tax levied upon all South African diamond producers; it also retains profit-sharing (Crown) rights in certain mines—i.e., Premier, Namaqualand and the State Diggings. The British colonial governments of Sierra Leone and Gold Coast Colony and the French colonial governments of French West Africa and French Equatorial Africa have similar arrangements of government taxation and profit-sharing. In South Africa, Belgian Congo and Gold Coast Colony these arrangements are supplemented by an export duty upon diamonds.

58. In South Africa the government has passed two laws regulating mining and marketing (The Diamond Control Act of 1925 and the Precious Stones Act of 1927). Both laws favor the cartel. The government is also a voting member of the Diamond Producers Association. The Belgian Congo holds fifty percent voting stock in Forminiere; the So-

tries, whose sanctions would provide implements for curbing abusive practices of the cartel, would almost certainly be denied were the United States to take unilateral economic action against the cartel.⁵⁹

International Agreement:

Governmental efforts to secure a better bargaining position for American diamond consumers would appear to have the greatest chance for success if applied at the diplomatic level.⁶⁰ The method of international agreement was applied to the industrial diamond controversy with partial success during World War II, in the British-American conference of 1943 at London. The compromise agreement,⁶¹ which resulted in the establishment of a stockpile situated in Canada,⁶² defeated the hopes of the United States to obtain a stockpile of diamonds under American control which could have been used to support an attack upon the cartel. The treaty did, however, provide the United States with what was then estimated to be a three year industrial reserve⁶³ and froze industrial diamond prices at the level of 1940. British cooperation was also evidenced in the agreement to insure a nearly equal quantity of diamonds from which the United States could replenish its reserves when they fell below the level then regarded as a three year supply.⁶⁴

Behind such willingness of the British Government to acquiesce in American desires may well lie the strong credit position of the United States, and a favorable trade balance which has materially increased during World War

ciete Generale de Belgique holds another twenty-five percent of the voting stock. British government regulation during the war was firm but friendly to the cartel. The British Ministry of Supply established a separate Diamond Control Board of men from the industry. Thus, like the War Production Board, the cartel directors became the legal deputies of the British government. Since the single sales channel is in London, this gave the British effective control of the entire diamond industry. In the United States all purchases of diamonds had to be cleared through an agent of the Diamond Control Board situated in the British Consulate in New York City.

59. For a detailed list of possible forms of unilateral action against cartels see Hose-litz, *International Cartel Policy*, 55 J. POL. ECON. 1, 21-7 (1947). See also EDWARDS, A CARTEL POLICY FOR THE UNITED NATIONS 70-93 (1945).

60. See Hamilton, *The Control of Strategic Materials*, 34 AM. ECON. REV. 261, 268 (1944). This article also regards the bilateral form of agreement, limited to a specific strategic material, as the more promising for the immediate future. *Id.* at 271. As regards reciprocal trade agreements, see also Berge, *Cartels as Barriers to International Trade*, 11 LAW & CONTEMP. PROB., 684, 688 (1946).

61. Industrial Diamond Treaty. See *supra* n. 2.

62. *Id.*, Article 3. The stockpile was established at Montreal.

63. *Id.*, apps. III, IV. A comparison of these two shows that the United States stocks, as of June 30, 1942, which the treaty agreed to maintain (see Article 6) were three times as large as the estimated annual needs of the United States and Canada combined. Critics of the agreement who claim that it provided for only a year's reserve supply ignore the fact that American consumption tripled before the end of the war.

64. *Id.*, apps. IIB, IV. See Article 6, *Conditions of Withdrawal*, for the requirements to be met before the Canadian stockpile could be drawn upon.

II.⁶⁵ Important among the debtor nations are the four countries most concerned with the diamond cartel—Great Britain, Belgium, France, and Portugal. The powerful bargaining position of the United States, its importance as the largest consumer of diamonds, and the desire of the debtor nations to expand their foreign trade, combine to fashion a diplomatic lever for the United States government's use.⁶⁶ With such a tool, the State Department should be able to obtain firm commitments that these countries will curb private monopolies, such as the diamond cartel, which restrain world commerce.

Of even greater value to the American consumers would be the establishment of an International Trade Organization. Suggestions for such an organization of the United Nations were made some time ago.⁶⁷ At a preparatory meeting in London in 1946, the plan of organization and policy suggested by the United States⁶⁸ was discussed and modified.⁶⁹ The resulting Preliminary Draft Charter for the International Trade Organization of the United Nations⁷⁰ describes certain practices, such as fixing prices, production quotas, and marketing terms as *prima facie* restrictive business practices.⁷¹ Subject to a determination by the Organization that such harmful activities exist, the charter provides for recommendations to each member nation within whose jurisdiction the cartel under consideration operates.⁷² The member nations then become obligated to take remedial action in accordance with their own laws and procedures.⁷³

Though open to the criticism that its procedure may be cumbersome and that its enforcement technique may vary considerably with the law of the country involved,⁷⁴ a United Nations organization would provide a long step forward in the international regulation of cartels. The determining factor in

65. See *Post-War Economic Policy and Planning*, H. R. REP. No. 541, 79th Cong., 1st Sess. 18 (1945).

66. The dominant credit position of the United States in foreign trade may have disadvantages as well as advantages because the nations of Europe must find markets to which they can export to create dollar credit balance. See Lockwood and Schmeisser, *Restrictive Business Practices in International Trade*, 11 LAW & CONTEMP. PROB. 663, 666 (1946).

67. See *Post-War Economic Policy and Planning*, H. R. REP. No. 541, 79th Cong., 1st Sess. 43 (1945); COMM. POLICY SER., No. 79, *Proposals for Expansion of World Trade and Employment*, Dep't State Pub. 2411, 19 (Nov. 1945).

68. COMM. POLICY SER., No. 93, *Suggested Charter for an International Trade Organization of the United Nations*, Dep't State Pub. 2598 (Sept. 1946).

69. The modifications have been seriously criticized as weakening the proposals. See *Sold Down the Thames*, BUSINESS WEEK, Dec. 14, 1946, p. 120.

70. COMM. POLICY SER., No. 98, Dep't State Pub. 2728 (Dec. 1946).

71. *Id.*, Article 39 (3).

72. *Id.*, Article 40 (6).

73. *Id.*, Article 42 (2).

74. Compare criticisms in *Sold Down the Thames*, BUSINESS WEEK, Dec. 14, 1946, p. 120; Lockwood & Schmeisser, *Restrictive Business Practices in International Trade*, 11 LAW & CONTEMP. PROB. 663, 680 (1946) with Terrill, *The American Trade Proposals: Restrictive Business Practices*, 14 DEP'T STATE BULL. 455 (1946).

the ratification of the present Preliminary Charter, as in any plan to regulate the diamond cartel, is the attitude of the British government.⁷⁵ If the British can be convinced that they will be able to increase their volume of exports, and so improve their trade balance,⁷⁶ by adopting a policy of enforcing free trade, other hesitant nations will probably fall into line. The recent financial loan to Great Britain, France, and Belgium should have a salutary influence upon these governments and make them more conducive to our proposals. Such a program seems to provide the most rewarding method of attacking restrictive business practices in general and the diamond cartel in particular.

CONCLUSION

It is suggested that governmental efforts to destroy the diamond cartel merely through legal action of the pending anti-trust type are doomed to failure so long as DeBeers continues to avoid general business operations in the United States. Only as a harassing weapon or as a last resort should legal attack be used. Best results may be expected if the United Nations will agree to outlaw restrictive trade practices and develop a workable method of enforcing this policy. If this opportunity fails, the United States may be able to achieve the same result through multi-lateral agreements with the diamond producing nations. The strong economic position of this country should plead our cause with eloquence. Should all attempts at diplomatic negotiations fail, a governmental purchasing agency would appear to be the most effective unilateral economic weapon with which to attack the diamond cartel.

75. See EDWARDS, A CARTEL POLICY FOR THE UNITED NATIONS 101 (1945); Hoselitz, *International Cartel Policy*, 55 J. POL. ECON. 1, 14-6 (1947).

76. See EDWARDS, A CARTEL POLICY FOR THE UNITED NATIONS 107 (1945).